Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1660

S. WILLIAM GREEN, EVELYN GREEN and CYNTHIA COLIN, as Executors of the Estate of LOUIS A. GREEN, deceased, and EVELYN GREEN, individually, and as stockholders of KIRBY LUMBER CORPORATION, suing on behalf of themselves and for the benefit of said corporation and for the class of all other stockholders of said corporation similarly situated,

Petitioners,

v.

SANTA FE INDUSTRIES, INC., SANTA FE NATURAL RESOURCES, INC., KIRBY LUMBER CORPORATION, and MORGAN STANLEY & Co.,

Respondents.

PETITIONERS' REPLY BRIEF

SIDNEY BENDER
Attorney for the Petitioners
405 Lexington Avenue
New York, New York 10017
(212) YUkon 6-4080

Of Counsel:
AARON LEWITTES

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PETITIONERS' REPLY BRIEF

(1) Respondents' brief is bottomed on the erroneous premise that the petitioners-plaintiffs do not allege the facts necessary to state a claim against Morgan Stanley & Co. as an aider and abettor of the principal fraud. Yet the Petition shows that the necessary facts for that claim have been alleged. For the principal fraud, see Pet. pp. 4-6; and for Morgan's knowing and affirmative participation, for compensation, in Santa Fe's fraudulent scheme,

see Pet., pp. 7-9. Respondents themselves give the game away by conceding (at pp. 5-6) that

> the amended complaint asserts that Morgan Stanley was an accessory to the corporate principals in that it "knowingly assisted and facilitated such fraud by submitting an appraisal of the stock at $125 per share even though said defendant knew the pro rata value of the physical assets of Kirby was at least $772 per share." (*Id.*, at 8)

Plaintiffs have clearly alleged facts showing the three things that, respondents' brief concedes (p. 10), are sufficient to maintain their claim against Morgan as an aider and abettor.

(2) Respondents' brief (p. 6 et seq.) merely repeats the errors in the Opinion below with respect to the claim against Morgan and completely overlooks the Petition's discussion, at pp. 17-20, pointing out those errors in detail.

(3) Contrary to respondents' brief (p. 11), the Court below held that the principals had engaged in fraud or deception. E.g. Judge Medina referred to the "fraud inherent in the merger itself" (A-6; see also A-6 under "Second"; A-8; A-13; A-14; A-15; A-16). Judge Mansfield, concurring, stated that the "merger amounts to a 'manipulative or deceptive device or contrivance' which operates as a fraud on public stockholders" (A-23); and that "disclosure *after* the merger . . . is virtually the equivalent of no disclosure at all" (A-30).

(4) Contrary to respondents' brief (p. 10), plaintiffs do allege the requisite knowledge on Morgan's part; see Pet., pp. 7-8; 19. And contrary to respondents' brief (p. 10), plaintiffs have alleged substantial assistance to the principal fraud; see Petition, pp. 5-6, item (ii); pp. 6-7:

Morgan "consented to the transmission to the stockholders of its misrepresentation of the value as part of Santa Fe's fraudulent scheme."

(5) Contrary to respondents' brief (p. 14), plaintiffs do allege Morgan received benefit from the scheme—$125,000 for a 2 page opinion; Pet. pp. 7, 20.

(6) Respondents ignore the importance of aider and abettor liability in private enforcement of the securities laws (Pet. p. 14 et seq.); and that this Court expressly left open the elements thereof for such enforcement in *Ernst*, for consideration in another case. Despite respondents' naked disclaimer, the conflict between dismissal below of the claim against Morgan and the Seventh Circuit's decision in *Brennan* is patent (Pet. p. 17 et seq.).

(7) After our Petition was filed, this Court handed down its decision in *TSC Industries, Inc.* v. *Northway, Inc.*, 6/14/76, emphasizing the importance of letting securities cases go to trial where there are genuine issues of fact. *A fortiori*, this Court should review the improper dismissal, even before discovery or other pre-trial, of a claim against an aider and abettor of a securities fraud.

Conclusion

The Petition for certiorari, to review the judgment affirming dismissal of the complaint against Morgan Stanley & Co., should be granted.

Respectfully submitted,

SIDNEY BENDER
Attorney for Petitioners

Of Counsel:
AARON LEWITTES